In the
Supreme Court of the United States

OCTOBER TERM, 1960

No.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION No. 310, PETITIONER,

v.

THE NATIONAL LABOR RELATIONS BOARD, RESPONDENT,

and

SHAMROCK DAIRY, INC., INTERVENOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above-entitled case on June 16, 1960. Such judgment affirmed an order of the National Labor Relations Board directing the intervenor to bargain collectively with petitioner, particularly in respect to the adoption or continuance of "an independent distributorship plan" for its milk delivery drivers, but which order failed to grant petitioner certain other relief, including restoration of the status quo as it existed prior to the unfair labor practices engaged in by the intervenor.

OPINION BELOW

The Opinion of the Court of Appeals below is not yet reported and is attached hereto as Appendix A. See also R. 173.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1960, but the decree has not yet been entered.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

QUESTIONS PRESENTED

1. Where the Board has found that an employer had unlawfully, and in violation of Sections 8 (a) (1) and (5) of the National Labor Relations Act as amended, entered into individually signed distributorship contracts with all but six of its driver-employees (which six were discharged when they refused to sign) during the term of an existing collective agreement covering such drivers without first consulting with the union party thereto, and where the employer had not given the notices of termination or modification of the collective agreement and had not continued it in full force and effect for its term as required by Section 8 (d) of the Act, did the Board effectuate the policies of the Act and afford adequate relief when its order directed only that the employer bargain with the decimated union concerning future continuance or adoption of the individual contracts without also directing, as a condition to bargaining, that individual contracts already entered into be abrogated and the discharged drivers reinstated; and whether the Board should not have additionally found Section 8 (d) and 8 (a) (3) violations under the undisputed facts.

2. Whether, consistent with the protective policies of the Act, the Board under its own findings of fact, should have concluded that the drivers retained their employee

status notwithstanding the negotiation of the individual contracts.

STATUTES INVOLVED

The pertinent provisions of the Labor-Management Relations Act (61 Stat. 136, 29 U.S.C. Sec. 151, *et seq.*) are Section 2 (3), Section 7, Sections 8 (a) (1), (3) and (5), Section 8 (d), and Section 10 (c):

"Section 2 (3). The term 'employee' shall include any employee . . . . but shall not include . . . . any individual having the status of an individual contractor . . . ."

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"Sec. 8 (a). It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7: . . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a)."

"Sec. 8 (d). For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees

to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract whichever occurs later: . . ."

"Sec. 10 (c) . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . ."

STATEMENT

A. The Facts

The facts are as found by the trial examiner in his intermediate report, R. 144, which findings of fact were adopted by the Board in their entirety; there is no dispute concerning them. They can be summarized as follows:

Petitioner Local Union 310 (hereinafter called the Union) is a local union of truck drivers affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, with jurisdiction in the Phoenix and Tucson, Arizona, area and admitting to membership employees of the intervenor Shamrock Dairy, Inc., (hereinaffer called the Employer). That Employer is the owner and operator of a dairy plant and distribution business in Tucson, Arizona, in connection with which it employs drivers of milk delivery trucks, which drivers are members of and represented by the Union. Collective bargaining relationships between Shamrock Dairy, Inc., and the Union as the exclusive representative of such drivers had existed since 1937. The last contract between the parties was made in October, 1953, to run until October 1, 1955. That contract contained a clause (R. 113) stating that "No employee shall be required to make any verbal or written contract which in any way conflicts with the articles of this Agreement". Other provisions of the Agreement

accorded the Union exclusive recognition as representative of the Employer's drivers until the expiration of the contract in October of 1955.

In the middle of July, 1955, while the collective agreement was in full force, the employer, without notice to the Union, to the Federal Conciliation Department, or to State Mediation authorities as is mandatorily required under Section 8 (d) of the Act, and in direct disregard of the above-quoted portion of the Agreement, instituted individual negotiations with the drivers, and unilaterally imposed a so-called "independent distributorship plan", under which the Employer sold its milk routes and trucks to its drivers who then were to operate them, purportedly as independent contractors under individual contracts. All drivers but six were induced to sign the individual agreements by threats of discharge on the one hand, and by promise of benefit on the other hand in the form of cash credits to be used for the purchase of the trucks by those drivers who would agree to sign the individual agreements, such cash to come from credits due the drivers under their pension plan. Among other things, these individual contracts (R. 70) provided that the Employer had the right, unilaterally and for any cause, to terminate the contract and reacquire the "entire distribution business" of the driver, including the truck, at a preestablished price, to determine the time and place at which deliveries were to be made and to police the manner in which deliveries were made, to set the price at which the driver could buy and sell the milk, and to forbid the driver to sell any product not manufactured by the Dairy. The six drivers who refused to sign the individual contracts were discharged.

As soon as the Union learned of the establishment by the Employer of the independent distributorship plan, it dispatched a letter to the Employer, dated July 29, 1955, complaining of the Company's action as a breach of the existing collective agreement, and further stating that unless the

Employer was willing to rectify the situation, the Union would be forced to take necessary action. The Employer did not respond to this letter, and promptly on August 2, 1955, the Union filed charges with the National Labor Relations Board alleging that the Employer had committed unfair labor practices in violation of various provisions of Section 8 (a) of the Act in entering into the individual contracts with the driver members of the Union.

Subsequently, on September 8, 1955, the Union sent to the Employer proposed amendments to the existing contract which was about to expire. The Employer met with the Union on October 3rd and told it that it would not recognize the Union with respect to the drivers who had signed the individual contracts. It was on that same day that the Company discharged the drivers who had refused to sign the individual contracts.

B. The Proceedings Below

Upon the filing of charges by the Union, a complaint was issued against the Employer alleging in substance that the Employer had by-passed and refused to bargain with the Union by entering into individual contracts of employment with its drivers in violation of Sections 8 (a) (1) and (5) of the Act; that it had failed to give the notices of termination of the contract and abide by its terms as required by Section 8 (d) of the Act; and that it had unlawfully discharged the six drivers who had refused to sign the individual contracts in violation of Sections 8 (a) (1), (3) and (5) of the Act.

Following a hearing the trial examiner found that the Employer had committed the foregoing unfair labor practices and recommended that the Employer restore the status quo by (a) offering to the discharged employees reinstatement with back pay, (b) upon request bargain collectively with the Union as the exclusive representative of all drivers, and (c) notify the drivers with whom the Respondent had made individual contracts that it would no

longer attempt to enforce such contracts, but without prejudice to the assertion by the individuals affected of any legal rights they may have acquired under the contracts. (R. 160.)

On appeal, the Board, while agreeing with the trial examiner's findings of fact, in split decisions rejected certain of his conclusions of law and his recommendations. One member, Chairman Leedom, concluded that the Employer had violated Sections 8 (a) (1) and (5) of the Act by failing to bargain with the union concerning the institution of the independent distributorship plan, but found no 8 (a) (3) violation in the discharge of the six drivers. He found it unnecessary to pass upon whether Section 8 (d) of the Act had been violated. The second member of the three member panel, Abe Murdock, agreed with the conclusions and recommendations of the trial examiner in their entirety. (R.129.) The third member, Stephen Bean, agreed with the Chairman that Section 8 (a) (3) had not been violated but did not pass on the remaining issues, including the 8 (d) issue, because he felt the complaint should have been dismissed in its entirety, there being no affirmative showing that the union in fact represented a majority of the drivers at the time of the alleged unfair labor practices. R.138.

As a result of these conflicting views, the majority order (R. 126) merely directed the Employer to bargain with the Union on the question of whether the independent distributorship system should be *continued*, or, as to any new employees, whether it should be adopted as to them; the order made no attempt to restore the status quo.

Thereafter, the Union filed its Petition to Review the Board's order in the Court below, and the Board filed its Answer to this Petition and its Petition to Enforce as against the Employer Shamrock Dairy, and such Employer was granted permission to intervene. On November 5, 1958, following the submission of briefs and oral argument, the Court below remanded the case to the Board with

orders to make specific findings as to whether the signing of the independent distributorship contractors changed the status of the drivers from employees to independent contractors and whether, in any event, the employer violated Section 8 (d) of the Act, and if so, whether Section 8 (a) (3) was not also violated by the discharge of the six drivers. (R.170.-171.) On February 26, 1959, the Court below enlarged its prior remand by directing the full Board to reconsider the entire case. (R.172.)

On August 13, 1959, the full Board (except member Rogers who had disqualified himself) issued its Decision and Order on Remand. (Supplemental Record.) Although the full Board adopted its former findings of fact, it once again split on the issues, with the result that the specific findings requested by the Court below were not made, a majority not being able to agree on any of them.

Only one member, Chairman Leedom, found that the negotiation of individual distributorship contracts converted the drivers from employees to independent contractors. Two members, Joseph Jenkins and John Fanning (who had replaced former member Murdock) found that the drivers continued their status as employees notwithstanding the signing of the individual contracts. The fourth member, Stephen Bean, again held that the complaint should have been dismissed in its entirety because of its failure to affirmatively establish that the union represented a majority of the drivers at the time of the unfair practices and declined to pass upon the issue of whether the status of the drivers had been changed by the signing of individual contracts and whether Section 8 (d) had been violated.

On the issue of the 8 (d) violation, two of the Board members, Jenkins and Fanning, found such a violation because, during the term of the existing collective agreement, the employer had negotiated the individual contracts with the employees embraced thereunder without having given the notices and observing the contract as required by Section

8 (d). Only the Chairman found no 8 (d) violation, this on the theory that the individual distributorship contracts "were not contracts of employment and the respondent continued in full force and effect the provisions of the collective agreement with respect to those drivers who did not sign the individual contracts." He further concluded that the execution of individual contracts "was not inconsistent with the collective bargaining contract as the individual contracts pertained not to terms or conditions of employment but involved the termination of employment status of the drivers".

On the issue of an 8 (a) (3) violation, the Chairman and member Bean found none to exist, while members Jenkins and Fanning found that the employer had violated that Section by discharging the six drivers.

All of the members, except Bean, who again refrained from passing on the issue, found that the employer had refused to bargain in violation of Section 8 (a) (1) and (5) of the Act. Because this was the only issue on which a majority of the Board could agree, the Board ordered the same limited remedy which it had directed in the original case. Members Jenkins and Fanning were of the view however, that this remedy, even as applicable to the 8 (a) (1) and (5) violations, did not go far enough because it did not abrogate the unlawful individual contracts and failed to restore the *status quo ante* and permitted the Employer to retain the fruits of its unlawful conduct. Accordingly in addition, they would have ordered further remedies based on Section 8 (d) and Section 8 (a) (3) violations.

The petitioner then moved the Court below to modify the order of the National Labor Relations Board as requested in its original petition for review and to enforce that order as so modified. Written memoranda in support of and in opposition to such motion were filed by the parties and thereafter on June 16, 1960, the Court below entered a per curium Order, Judge Washington dissenting, affirming the Board order of August 13, 1959. The majority merely

stated, without discussion, that it was "of the view that the drivers ceased to be employees and became independent contractors when they signed contracts for distributorship; that the six drivers who did not sign as distributors should not be reinstated because their discharge was the result of a "reduction in force;" and that, although Shamrock Dairy, Inc., technically violated the Act in failing to give the Union an opportunity to discuss the independent distributors' plan, the court concludes that the order of the Board entered in this proceeding on August 13, 1959, should be and it is affirmed."

In his dissent Judge Washington found an obvious and unremedied 8 (d) violation in addition to the "technical" violation of Section 8 (a) (5), and also an 8 (a) (3) violation even though it be assumed that the status of the drivers had been changed from employees to independent contractors, and he further found that such status had not been changed under common law tests and particularly not under considerations of Taft-Hartley policy which require any possible doubt to be resolved in favor of maintaining existing protections of employees rights and avoidance of possible industrial discord.

The judgment of the Court below was entered on June 16, 1960 and appears at R. 173-187, its decree has not yet been entered.

REASONS FOR GRANTING THE WRIT

This case involves important questions of the application and administration of the National Labor Relations Act as amended, which have not been but should be settled by this Court, and also possible conflict with prior decisions of this Court. The Board has failed to apply or enforce an important portion of the Act (Sec 8 (d)) in a context which has not heretofore been considered by this Court. Although finding various violations of the Act by the employer, the Board has failed to grant the relief which such violations

call for under applicable decisions of this Court. Finally it has failed to resolve an issue—that of the status of the delivery drivers as employees under the Act—which issue this Court has decreed is its duty to resolve.

A.

For the first time there has been brought to this Court's attention the issue of the appropriate application and enforcement of the requirements of Section 8 (d) that notices of contract modification or termination be given and existing agreements observed until their termination. In the face of admitted failure by the Employer to observe those requirements and the extreme damage thereby inflicted on the Union, the Board has taken no steps whatsoever either to make such violations the subject of a cease and desist order or to afford petitioner relief from the effects of such violations. A majority of the Court below did not discuss the issue, and only this Court can require the Board to give effect to the mandatory provisions of that Section and enforce the Act as written. Further, as will be seen, the Board has failed to afford adequate relief in other respects when it left the decimated Union to bargain concerning whether the Employer should retain the fruits of its unfair labor practices. Even as to the limited violations of the Act it did find that the Employer had committed, the Board paid no heed to the admonition of this Court in *NLRB* v. *District 50, UMW*, 355 U.S. 453 that the Board's undoubted discretion to frame orders remedying unfair labor practices is limited by the requirements that such orders for redress must (1) "effectuate the policies of the Act", (2) "be appropriate" under the total circumstances, and (3) "be adapted to the situation which calls for redress."

B.

An additional issue of national importance and affecting large segments of American industry is present in this case. One member of the Board, and two members of the

Court below but without discussion, have concluded that the signing by the drivers of the individual distributorship contracts converted their status from that of "employee" to that of "independent contractor," as those terms are used in Section 2(3) of the Act as amended in 1947. While this amendment was made to "correct" this Court's decision in the Hearst Case (*NLRB* v. *Hearst Publications* 322 U.S. 111), nevertheless, as pointed out by Judge Washington in his dissent, that amendment sought only to require that common law tests of the employee relationship be used rather than administrative expertise, and the amendment did not seek or have the effect of overturning the canon of construction laid down by this Court in that case when it said (Id. at 129): "Where all the conditions of the relationship require protection, protection ought to be given." In this case the trial examiner and all Members of the Board who considered the question, save one, concluded that the employee relationship had not been terminated by the signing of the individual contracts, and Counsel for the Board in arguing the issue below contended only that there was a "reasonable basis" in the evidence for the conclusion that the employee relationship had been terminated. This Court admonished in Hearst that where, under the same facts and using the same common law tests, opposing conclusions can reasonably be drawn, the policy of the Act to afford protection where required should be effectuated by finding an employee relationship. In this case, as in the case of many thousands of other delivery employees, to deny an employee relationship by the simple device of individual "distributorship contracts" is to deprive such employees of all benefits of organization and collective bargaining even though their duties, responsibilities and employer controls remain the same. If employers in the milk industry, in the bread industry, in the beer or beverage industry, or in other industries where the distribution of the product to the individual customer is an integral part of the business, are to be permitted by that device to avoid their collective

bargaining obligations and deprive their driver employees of the right of self-organization, many thousands of employees throughout the country will find themselves without the benefits of the Act's much needed protections.

C.

The first issue in this case concerns the propriety and adequacy of the Board's remedial order entered against the Employer herein, particularly in view of the requirements of Section 8(d) of the Act and the effect on petitioner of the failure of the employer to follow those requirements as well as the requirements of Section 8(a)(5). It is not controverted by Counsel for the Board and it is implicit in the Board's decision that had a majority of the Board been able to conclude that the drivers had retained their employee status notwithstanding the signing of the individual agreements, the Board would have been obliged to grant the additional relief requested below; accordingly, a resolution of that issue in petitioner's favor would dispose of the issue of the adequacy of the Board's order. It would seem clear, however, that regardless of how the employment status issue is resolved, the relief requested by petitioner should have been granted upon the undisputed facts in this case, and that in failing to order such relief, the Board and the majority below have disregarded the mandate of this Court in the *District 50* case, supra, that the Board's remedial orders must be appropriately adapted to the situation calling for redress as well as effectuate the policies of the Act.

What is the situation calling for redress? By virtue of its 8(a)(5) violation alone and its failure to meet and discuss with petitioner prior to forcing the individual distributorship plans upon its employees, the employer herein has decimated the Union as a collective bargaining representative; when the remaining six who refused to sign were discharged, the Union became a mere shell. Yet the Board's only remedy for the employer's initial failure to bargain was to require the Employer to bargain with this shell as

to whether the individual contracts should be continued as to old employees or should be adopted as to any new employees. Had there been proper bargaining when the Union had its full membership, it may well have been, for all the Board or anyone else can know, that the individual contracts would never have been entered into. This is particularly true in view of the clause in the existing collective agreement under which the Employer had pledged that it would not require any individual employee to make any verbal or written contract which would in any way conflict with the collective agreement. It is the usual function of remedial orders at least to place the parties in the status quo which existed prior to the wrongdoing, and certainly it is not the function of such orders to permit the wrongdoer to retain the fruits of the unlawful activities while placing the injured party in a less favorable position than before—here an impossible position. As stated by Board Member Murdock dissenting in the original Board proceedings:

> "Instead of purging the unfair labor practice the order merely tell the Respondent to bargain as to whether it should be purged. It is naive to think that any effective bargaining can take place at a table where the Respondent is permitted to sit holding the fruits of its unfair labor practices and need only discuss whether it should give them up."

D.

The foregoing considerations are applicable even though the employer's 8(a)(5) violation alone is taken into account. But we have here additional violations which are totally ignored and unremedied. Section 8(d) of the Acts sets forth in mandatory language that no party to a collective agreement shall terminate or modify that agreement without giving a 60-day notice to the other party. Section 8(d) further provides mandatorily that after giving such notice, the noticing party shall continue the agreement in full

force and effect without lockouts until the expiration of the contract. None of this was done: the employer completely ignored the requirements of Section 8 (d) and in addition his contractual obligation that he not require any of his employees to make any individual contract in conflict with the collective contract. The purpose of Congress in imposing the 8 (d) requirements (see 80th Cong., 1st Sess., Sen. Rep. No. 105, p. 24, and H. Conf. Rep. No. 510, pp. 34-35) was to oblige all parties to existing agreements to resort to the processes of collective bargaining to resolve not only any differences over wages and working conditions, but also differences over terminations of such agreements, and to maintain them for their term rather than resort to the disruption of strikes or lockouts. Yet, the Board's Chairman, the only Board member to find no 8 (d) violation, and the Court below which did not pass on the issue, completely ignored this blatant violation and the disastrous effect of such violation upon petitioner and took no steps either to prevent its repetition or to remedy its effects.

The Chairman found no 8(d) violation on the ground that the signing of the individual contracts terminated the employee relationship just as would a discharge, and that therefore no change could be said to have been made in the wages or working conditions, nor was there any contract termination, the contract continuing as to those who didn't sign. Nothing could be more unrealistic than this reasoning. As is clear from the undisputed facts and, as found by the Trial Examiner, the two Board members who did pass on the issue, and Judge Washington below, the drivers continued to perform the same services with respect to Shamrock products as they had before—their essential economic function remained the same. But, as will be briefly adverted to later, their compensation, hours and working conditions were vitally effected by the signing of the individual distributorship contracts; as stated by Judge Washington below: "Through these contracts the drivers

are economically tied to Shamrock as effectively as any man working on a wage, piece rate or commission basis," and economically are placed "at the mercy of Shamrock." See in addition the recent decision of this Court in *Local #24* v. *Oliver*, 358 U.S. 283 (January, 1959) in which this Court discussed the economic relationship between employers and drivers operating on a lease basis. Furthermore, whatever else the signing of the individual contracts and the discharge of the drivers who didn't sign may have accomplished, it certainly accomplished a termination for all practical purposes of the collective agreement, including a disregard of the clause obligating the employer to refrain from doing exactly what he did do—sign the employees to individual contracts. Thus, the very subjects which Section 8(d) sought to protect were ignored. Surely an 8(d) violation should have been found and a remedy directed alleviating the effects of the violation and redressing the injured party. Congress framed Section 8(d) in terms of duty, not in terms of reminder. But for the disregard of its provisions, the individual contracts would never have been negotiated and the employee relationship would not have been altered—certainly not until the end of the contracts, and for all the Board can know, at any time in the future.

E.

The redress to be effected should include not only abrogation of the individual contracts, but also reinstatement of the six discharged drivers. This could be done even though there was no direct evidence of an intent to discriminate against them because of their union membership. Whatever may be concluded from the record in that particular, it is nevertheless perfectly clear that the drivers were discharged solely because they had refused to engage in individual bargaining with their employer at a time when they were still employees, at a time when they were represented by a duly selected collective bargaining agent, and at a time when they were beneficiaries of a contract

which provided that they shall not be required to make any contract in conflict with their collective agreement. One of the key protections in Section 7 is that of the right of employees 'to bargain collectively through representatives of their own choosing.' If, while still employees and still presumably entitled to the protections of the Act, they can legally be coerced by threat of discharge or promise of benefit to engage in individual bargaining, this right to engage in collective bargaining through a union representative obviously becomes meaningless. And, in addition to the disregard of that protection which will be effected if the discharges in the present case are condoned, there is the additional factor, as noted by Member Murdock, that thereby 'the employer undeniably discourages membership in the union which the employees have selected', so that the discharges would be discriminatory and in direct violation of Section 8(a) (3) of the Act."

Thus, reinstatement could be ordered either on an 8(a) (3) theory, on an 8(d) theory, or on an 8(a) (5) theory, as the Board has done on other case. See *In the Matter of West Boylston Mfg. Co.*, 87 NLRB 808.

F.

The Court below and the Board's Chairman, the one member so holding, erred in their conclusion that the signing of the individual contracts converted the drivers from employees to independent contractors as those terms are used in Section 2 (3) of the Act,[1] and in so doing ignored the important rule of construction announced by

[1] It is significant that the state court of Arizona (Shamrock Dairy v. Teamsters Local Ariz. Super. Ct., Pima County, Case No. 46,492, Sept. 1955, reported in 36 LRRM 2748) specifically held that notwithstanding the signing of the individual contracts the Shamrock's drivers remained employees. Further, as noted by the trial examiner herein (R. 944), the Arizona Employment Security Commission has tentatively ruled that Shamrock's drivers remain employees.

this Court in *NLRB* v. *Hearst Publications Inc.*, supra, that doubts in this area be resolved in favor of retaining the employee status. We have seen that this issue is an important one, affecting many thousands of similarly situated delivery drivers throughout the country.

The facts are not in dispute, and, since the 1947 amendments, to Section 2 (3), the issue is one of law. See discussion on this point by Judge Washington in his dissent. Since the right to control is the determining factor (*NLRB* v. *Nu-Car Carriers Inc.* 189 F.2d 756 (C.A.3); *Radio City Music Hall Corp.* v. *U.S.* 135 F.2d 715 (C.A. 2)), the terms of the individual contracts are controlling. Under these individual agreements, the Employer, while allegedly selling both the delivery trucks and the delivery routes to the drivers, nevertheless obtained to a substantial legal degree most of its former controls over the manner and means of making milk deliveries and to a practical degree all of them. The Employer retained the absolute right to repurchase the trucks and routes at a pre-established price at any time that it may unilaterally and in its complete discretion so determine. The cases generally hold that this element alone "tends strongly to show that the person employed is not an individual contractor" (27 Am. Jur. 501, Sec. 21). But here we have not only the power of unilateral termination of the agreement reserved in the employer, but also, in the interval before he exercises such right, the company has reserved to itself the further rights to determine the size of territory, the time of pickup and delivery of products, the approval of insurance contracts, the payment of incentive money awards for additional customers, the right to instruct the drivers to serve any customer, and the right to determine the manner and means by which they wish the customer served by the enforcement of the "high standards established, followed and maintained" by the company, the

right to determine the type of helper whom they would permit the drivers to engage, the right unilaterally to appoint substitutes for the drivers and to fix their compensation, and the right unilaterally to determine the time and place at which individual services are to be performed. Even more important, in terms of the Employer's control over the drivers compensation, was the power of the Employer to establish prices at which milk is to be bought from the dairy by the dri ers and to suggest "the prices at which the drivers can sell the milk". In view of the Employers absolute right to reacquire the delivery routes his "suggestions" could have the force of law.

The trial examiner herein, three Board members, Judge Washington below, and the Arizona courts concluded that not only were the drivers not independent contractors but as employees were in a more subservient position under the individual contract than they had been before. Since it can fairly be concluded as a matter of law that the drivers remain employees, "the consequences which may flow from denying employee status demonstrate that, absent facts which clearly show independent contractor or employee status at common law, special considerations relevant to Taft-Hartley must be determinative. Independent contractors have limited legal protection if they attempt to organize, bargain collectively, or otherwise control their income through concerted action. . . . . In addition, other persons engaged as employees by competitors of a principal whose agents are in the independent contractor category may find their principal's profits, and consequently their wages, undercut by price competition from the "independent" agents. In short, a determination of independent contractor status does not merely affect the union as an organizational entity, but affects all persons who perform functions economically similar to those performed by persons represented by the union." Judge Washington dissenting below.

CONCLUSION

It is respectfully submitted that for the reasons asserted above this petition for a writ of certiorari should be granted.

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,357

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL UNION No. 310, PETITIONER,

v.

THE NATIONAL LABOR RELATIONS BOARD, RESPONDENT, SHAMROCK DAIRY, INC., INTERVENOR

No. 14,411

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SHAMROCK DAIRY, INC., RESPONDENT

On Petition to Review and Set Aside, and on Request for Enforcement of, an Order of the National Labor Relations Board

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Filed June 16, 1960

Mr. Herbert S. Thatcher was on the pleadings for petitioner in No. 14,357.

Messrs. Thomas J. McDermott, Associate General Counsel, National Labor Relations Board, *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Rela-

tions Board, and *Melvin Pollack*, Attorney, National Labor Relations Board, were on the pleadings for respondent in No. 14,357 and petitioner in No. 14,411.

Messrs. Arthur M. Kuhl, Richard G. Kleindienst and *Gerard D. Reilly* were on the pleadings for intervenor in No. 14,357 and respondent in No. 14,411.

Before WILBUR K. MILLER, WASHINGTON and BURGER, Circuit Judges.

ORDER

PER CURIAM: These cases came on for hearing and were remanded to the Board for further proceedings and are now before us on the motion of petitioner in case No. 14,357 for modification of the decree of the National Labor Relations Board and for enforcement of the decree as modified, on the opposition of Shamrock Dairy, Inc., of the reply of the Board to the petitioner's motion, on the petitioner's response to the reply of the Board and on the response of Shamrock Dairy, Inc., to the Board's reply.

Having considered all the foregoing pleadings, and being of the view that the drivers ceased to be employees and became independent contractors when they signed contracts for distributorship; that the six drivers who did not sign as distributors should not be reinstated because their discharge was the result of a "reduction in force;" and that, although Shamrock Dairy, Inc., technically violated the Act in failing to give the Union an opportunity to discuss the independent distributors' plan, the court concludes that the order of the Board entered in this proceeding on August 13, 1959, should be and it is affirmed. Counsel for the Board are directed to present within ten days a proposed enforcement decree.

WASHINGTON, *Circuit Judge*, dissenting: This is a petition to review and modify an order of the National Labor

Relations Board, reported at 119 N.L.R.B. 998 (1957). As the facts are fully set forth in that report, they need not be repeated in detail here. Briefly, Shamrock Dairy had a collective bargaining agreement with the petitioner union, which represented Shamrock's milk-truck drivers. Shamrock notified the drivers that it would sell its trucks and routes to the drivers, who would then become "independent contractors." It did not bargain with the union before instituting this plan. The union filed a charge, and the General Counsel of the Board issued a complaint. After further proceedings, the Board issued an order requiring Shamrock to cease and desist from (1) refusing to bargain collectively with petitioner with respect to "adoption or continuance of a system of product distribution known as the independent distributorship plan insofar as it affects the *tenure* of its employees," (2) entering into any new independent distributorship contract before bargaining with petitioner, and (3) "in any like or similar manner interfering with, restraining or coercing its employees in the exercise" of their rights under Section 7 of the Taft-Hartley Act.[1] (Emphasis added).

Petitioner union asks that the order be modified so as to reinstate certain drivers who were discharged when they failed to agree to the so-called "independent distributorship plan," that all existing contracts with other drivers be invalidated, and that Shamrock be ordered to bargain with respect to all terms and conditions of employment, not merely tenure. In support of these requests, petitioner maintains that Shamrock violated Sections 8(a)(1), (3) and (5), and 8(d) of the Taft-Hartley Act by adopting the distributorship plan without first bargaining with the union and by discharging the drivers for refusal to sign the individual distributorship contracts. Petitioner asserts that, in failing to invalidate existing contracts, order bargaining on all issues, and reinstate the discharged drivers, the

[1] 61 Stat. 140, 29 U.S.C. § 157 (1958).

Board has not restored the status quo. The Board responds that to abrogate the existing contracts will not effectuate the policies of the Taft-Hartley Act because Shamrock adopted the independent distributorship plan in the honest belief that the question whether the drivers should have "employee" or "independent contractor" status was one for the individual drivers to determine. Thus, it says, only a technical violation of Section 8(d)(5) was involved rather than a violation of Section 8(d). In addition, the Board maintains that the employees for whom petitioner seeks reinstatement were discharged "for valid economic reasons": Sections 8(a)(1) and (3) were not thereby violated. The Board asserts that since there was a "reasonable basis" for finding the drivers to be independent contractors rather than employees, this finding cannot be challenged.

The ultimate question is whether or not the Board's order effectuates the purposes of the Taft-Hartley Act. This depends in turn on whether or not the Board correctly ascertained the extent to which any provision of the Taft-Hartley Act had been violated, and Section 8(d) in particular. Section 8(d) specifies certain bargaining prerequisites where "wages, hours, and other terms and conditions of employment" are concerned.[2] In considering whether or not Shamrock Dairy's acts involved "wages, hours, and other terms and conditions of employment," the

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[2] Section 8(d) provides in pertinent part:

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reach if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract, employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or

Board thought it necessary to determine whether the status of the drivers was changed from "employees" to "independent contractors."

The members of the Board were not in agreement on either the status question or the Section 8(d) question. On the status point, Chairman Leedom was of the view that "the individual contracts pertained not to terms or conditions of employment but involved the termination of the employment status . . . and substitution therefor of the status of independent contractor." Decision and Order on Remand, p. 5. From this the Chairman concluded that Section 8(d) was not violated, and that it was not necessary to invalidate the independent distributorship contracts. Chairman Leedom cited two cases supporting his position: *Sloan* v. *Journal Publishing Co.*, 213 Ore. 324, 324 P.2d 449 (1958), and *Adams Dairy Co.* v. *Dairy Employees Union*, 363 Mo. 182, 250 S.W.2d 481 (1952). The theory underlying these two cases is that

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modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later. . . ."

the employer, in deciding to perform his work through independent contractors, is merely exercising his right to hire and fire,[3] and is not taking action affecting wages, hours, and terms and conditions of employment. Members Fanning and Jenkins, on the other hand, concluded that employee status was not lost, pointing to those aspects of the new contracts which deal with earnings and hours.

Certainly, it is clear that the new contracts deal with economic questions going far beyond "tenure," if tenure is used to express the duration of a functional, economic relationship rather than a legal relationship. The driver-salesmen continued to perform services with respect to Shamrock products under the distributorship plan—serv-

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[3] In *Adams Dairy*, the Dairy had discharged its old drivers and contracted with new drivers for the sale of trucks and delivery of milk under terms not unlike those in Shamrock. The Dairy sought an injunction to prevent the union from striking and picketing in protest to these contracts and discharges. The union defended on the ground that the Dairy had breached its collective bargaining agreement, which provided that "any major changes in the present working conditions or rules must be mutually agreed to by the Union employees, and Employer. . . ." The court held that these new contracts did not involve terms and conditions of employment and thus did not violate the collective bargaining agreement clause forbidding the employer to request employees to make contracts inconsistent with the collective agreement.

In Sloan v. Journal Publishing Co., 69 indpendent newspaper distributors sought to enjoin the Journal Publishing Company, under pressure from the American Newspaper Guild, from discontinuing a recently instituted independent distributorship plan.[3] On request from distributor-employees, the Journal had entered into an agreement whereby the distributors earned their income by purchase and resale instead of wages and commissions. The Guild, which was also a defendent, answered that the distributorship plan was adopted in violation of a pre-existing collective bargaining agreement and that discontinuance of the plan merely constituted a decision to cease breaching the collective agreement. The court held that the independent plan did not breach the collective agreement because the Journal had simply exercised "one of the traditional and fundamental rights of management to decide *for itself* whether to perform its functions by employees or by independent contracts. . . . ." 324 P.2d at 458. Since the court found that this right had not been expressly waived in the collective agreement, the Guild's defense was unavailing.

ices of a nature much the same as in the past. In fact, the essential economic function that these men performed was not different before or after institution of the distributorship system. But very great changes were made in their relations with Shamrock—changes which in my view were "with respect to wages, hours, and other terms and conditions of employment" within the meaning of Section 8(d).

Economically, the new contracts place the drivers at the mercy of Shamrock. Wholesale prices are set by Shamrock. Shamrock can unilaterally terminate any driver's milk contract, on which he must primarily depend. Collective and even individual bargaining is practically precluded because the drivers have agreed not to work for another dairy for two years. Thus, the drivers cannot use their good will as a bargaining weapon against the supplier. The Dairy can reap all good will for itself. Nor are a driver's capital assets of bargaining significance because Shamrock has a re-purchase option on each truck. Price competition on the retail level is unfeasible also because (1) the drivers sell under "recommended" prices from Shamrock—a recommendation enforcible through Shamrock's power of unilateral termination, and (2) retail prices are set in a broad market of which each individual driver forms a relatively insignificant part. Despite the fact that the drivers may carry other products and sell advertising on their vehicles, these cannot be significant factors over which the drivers exercise primary control because (1) in case of conflict with Shamrock, Shamrock may unilaterally terminate the milk contract, and (2) Shamrock may re-purchase the trucks at any time. The drivers cannot extend the geographic confines of their retail markets; thus, Shamrock can effectively control the size of the drivers' labor force. And certainly it cannot be said that an individual driver has any control over the price he pays for gasoline and insurance or over his taxes—the primary costs of the driver. *Through these*

contracts, the drivers are economically tied to Shamrock as effectively as any man working on a wage, piece-rate, or commission basis.

How can it possibly be said, in view of these facts, that the new contracts did not change "wages, hours, and other terms and conditions of employment"? Even assuming, arguendo, that the drivers became for some purposes "independent contracts," this does not excuse the Board from recognizing the practical effects of Shamrock's unilateral acts, which in fact changed wages, hours and many other aspects of the former system. Since Shamrock made these changes without complying with Section 8(d), a violation of that section occurred.

Council for the Board says, on brief, that an independent contractor relationship exists because there is a reasonable basis for this conclusion in the evidence, and the Board found such a relationship, precluding a finding that Section 8(d) was violated. On remand,[4] only one Board member out of four found an independent contractor status, two found that the driver-salesmen retained their employee status, and the fourth made no finding. The order was framed as if all agreed with Chairman Leedom that a change of status occurred. This split among the members of the Board does not prevent this court from deciding the issue of status. Status is not a question of fact under the Taft-Hartley Act,[5] nor does counsel for the Board assert that it is. The issue is one of law, and where the Board has an opportunity to make a specific finding, but fails to do so, this court should make an independent determination.

In determining status, the Board and the courts must construe the term "employee" to effectuate the purposes

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[4] We remanded the case to the Board, after hearing argument, to give it an opportunity to clarify its findings. It was unable to do so. The text of the decision and order on remand appears at 124 N.L.R.B. No. 63.

[5] See the remarks of Senator Taft and the legislative history of Section 2(3), recited *infra*.

of the Taft-Hartley Act, so long as a departure is not made from the common law standard of "right of control." Where either an independent contractor or an employee status can be regarded as reasonable conclusions from the facts, the Board and the courts are obliged to determine that the employee status exists. First, our duty to effectuate the purposes of the Act was manifested in *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 120-30 (1944). The Supreme Court there said "'Where all the conditions of the relation require protection, protection ought to be given.'" [Citing *Lehigh Valley Coal Co.* v. *Yensavage*, 218 Fed. 547, 552 (2d Cir. 1914)] *Id.* at 129. This canon of construction has not been vitiated by the Taft-Hartley Act. Section 2(3) of Taft-Hartley provides: "The term 'employee' shall include any employee . . . but shall not include . . . any individual having the status of an independent contractor. . . ."[6] The legislative history of Taft-Hartley indicates that independent contractors were specifically excluded from the term "employee" because of other aspects of the *Hearst* opinion. In *Hearst*, the Court had reasoned that common law concepts were irrelevant to a definition of "employee" and that the courts were obliged to sustain any finding of the Board which had "'warrant in the record' and a reasonable basis in law." *Hearst, supra*, at 131. The Court treated the Board's finding of employee status as a finding of fact, and it is this element of *Hearst* to which Taft-Hartley addressed itself primarily. Senator Taft explained Section 2(3)'s reference to independent contractors in the following terms:

> "The legal effect of the amendment therefore is merely to make it clear that the question whether or not a person is an employee is always a question of law since the term is not meant to embrace persons outside that category under general principles of the law of agency." 93 CONG. REC. 6441-42 (1947).

[6] 61 Stat. 137, 29 U.S.C. § 152(3).

This remark was made with reference to the bill which was reported from conference and became law. The bill which passed the Senate had not contained any reference to independent contractors, but it is clear that Senator Taft's interpretation is a fair representation of the intent of those in the House who supported this language. The House Conference Report stated that the difficulty that was found with *Hearst* was "that the ordinary tests of the law of agency could be ignored by the Board in determining whether or not particular occupational groups were 'employees' within the meaning of the Labor Act." Conference Report, H.R. Rep. No. 510, 80th Cong., 1st Sess. 32-33 (1947). In the original House report, the majority of the Labor Committee had more fully expressed their dissatisfaction with *Hearst*, and emphasized that in their view the Supreme Court had improperly given the Board a free hand. In particular, the House Report objected that in *Hearst* the "employees" had employees of their own. Thus it stated:

> "An 'employee', according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board* v. *Hearst Publications, Inc.* (322 U.S. 111 (1944)), the Board expanded the definition of the term 'employee' beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees'. The people the merchants hired to sell the papers were 'employees' of the merchants, but holding the merchants to be 'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the

act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors'. 'Employees' work for wages or salaries under direct supervision. 'Independent contractors' undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they received for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not farfetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes 'independent contractors' from the definition of 'employee'." Legislative History of Labor Management Relations Act, Vol. 1, p. 309 (1947).

I think Taft-Hartley goes no further than to assure that, as Senator Taft stated, "the *general principles*" of the law of agency will be considered. It does not make tort law the exclusive standard. This conclusion is buttressed by the fact that no objection was raised in the Committee Reports to *National Labor Relations Board* v. *E. C. Atkins & Co.*, 331 U.S. 398 (1947), which reiterated the *Hearst* policy with respect to effectuating the policies of the Act.

Accordingly, I believe that even though the right of control is now an essential consideration in determining whether or not a person has "employee" status, the Board and the courts must consider other factors. Certainly where conflicting inferences can be drawn from the facts, so as to support either a conclusion of employee or independent contractor status by the common law "right of control" test, considerations of Taft-Hartley policy should be persuasive.

The consequences which may flow from denying employee status demonstrate that, absent facts which clearly show independent contractor or employee status at common law, special considerations relevant to Taft-Hartley must be determinative. Independent contractors have limited legal protection if they attempt to organize, bargain collectively, or otherwise control their income through concerted action. An employer will not be obliged to bargain collectively with them, and if they act in concert to control their income by fixing resale prices they may be subject to Sherman Act prosecution. See Note, 67 YALE L.J. 98-100 (1957). Moreover, a determination in a Taft-Hartley case that certain agents are independent contractors might be persuasive in a proceeding by the principal to circumvent the Norris-La-Guardia Act and enjoin particular actions by those agents. And it may be to the principal's disadvantage that its "agents" are not employees, for picketing by organized, independent "agents" may be outside Section 8(b)(4). See *Chauffeurs Union*, 116 N.L.R.B. 955 (1956). In addition, other persons engaged as employees by competitors of a principal whose agents are in the independent contractor category may find their principal's profits, and consequently their wages, undercut by price competition from the "independent" agents. In short, a determination of independent contractor status does not merely affect the union as an organizational entity, but affects all persons who perform functions economically similar to those performed by persons represented by the union. Since discontent among these "agents" who are economically similarly situated may create friction among themselves and with those upon whom they are economically dependent, it is essential in the interest of industrial peace that all factors relevant to Taft-Hartley policy be considered, as well as the "right of control."

Particularly relevant to Taft-Hartley's objective of preserving industrial peace is the "agent's" ability substantially to control his net income by virtue of his bargaining

power in any of the particular markets in which he is involved. If a particular "agent" lacks bargaining power with respect to his principal suppliers, it is important to industrial peace that he at least be able to control his net income by reducing his costs, or increasing his retail price. As we have seen, Shamrock's drivers are practically impotent in these respects. Thus, I believe these driver-salesmen remain "employees" within the meaning of Taft-Hartley.

Furthermore, apart from special Taft-Hartley considerations, I think the drivers are still employees, even under the "right of control" test used at common law. Counsel for the Board and for the union both accept the statement of Judge Learned Hand in *Radio City Music Hall Corp.* v. *United States*, 135 F.2d 715, 717 (2d Cir. 1943), that "The test lies in the degree to which the principal may intervene to control the details of the agent's performance; and that in the end is all that can be said . . . ." It is interesting to note that Judge Hand used this definition to deny employee status under the Social Security Act to actors—a group which now benefits from Taft-Hartley protection. Nevertheless, the petitioner union has accepted Judge Hand's definition and demonstrated, convincingly, I think, that the drivers have not lost their employee status even by this definition. Control by Shamrock of the details of their performance on the job is all pervasive. In fact, counsel for the Board does not assert flatly that the salesmen-drivers are independent contractors, but that the Board had *a reasonable basis* for so finding. The Board is, by that argument, trying to resurrect the very portion of *Hearst* at which the Taft-Hartley amendment was most certainly aimed—the policy of viewing status as a question of fact, subject only to limited review.

Since the drivers have not lost their status as employees, their tenure has not been affected. The new contracts relate to terms and conditions of employment. These con-

tracts were entered into without the 60-day notice required by Section 8(d) and in violation of an express provision of the existing collective bargaining agreement that employees would not be asked to sign contracts in conflict with the collective agreement. Section 8(d) has been violated. Accordingly, I think Shamrock should be deprived of the fruit of the violation: the individual contracts should be invalidated.

The discharged employees should also have been reinstated. The Board found as a fact that these employees were not discharged to discourage union membership. Be that as it may, these men had a right to refuse the independent distributorship contracts because the contracts were not entered into pursuant to a collective bargaining agreement or after the breakdown of good faith collective bargaining. See *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 683 (1944); *Lion Oil Co.* v. *National Labor Relations Board*, 245 F.2d 376, 379 (8th Cir. 1957). Individual bargaining under these circumstances violates Sections 8(a)(1) and 8(a)(5).

For these reasons, I would remand the case to the Board for further proceedings not inconsistent with the foregoing.